

No. 12,912

IN THE

United States Court of Appeals  
For the Ninth Circuit

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JOSEPH PETER ODDO,

*Appellant,*

vs.

E. B. SWOPE, Warden, United States  
Penitentiary, Alcatraz, California,

*Appellee.*

BRIEF FOR APPELLEE.

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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for a writ of habeas corpus. (Tr. 19.) The Court below had jurisdiction over the habeas corpus proceedings under

Title 28, *U.S.C.A.* Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by

Title 28 *U.S.C.A.* Section 2253.

**STATEMENT OF THE CASE.**

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus and thereafter, represented by court-appointed counsel, an amended petition for writ of habeas corpus (Tr. 1-8), and the Court below issued an order to show cause. (Tr. 9.) Thereafter the appellee filed a return to order to show cause (Tr. 10-13), which the appellant traversed. (Tr. 14-18.) The matter was then submitted and the Court thereupon entered the following order denying petition for writ of habeas corpus:

“The Petition for Writ of Habeas Corpus was prematurely filed, since with good-time credits forfeited the said petitioner has not served the valid sentence heretofore imposed against him, and the Courts cannot inquire into whether or not the prison officials have properly or improperly forfeited good-time credits.

Accordingly, on the ground that the Petition is prematurely filed, the said Petition is hereby ordered dismissed and the Order to Show Cause heretofore issued herein is ordered discharged.

Dated: March 20th, 1951.

Michael J: Roche

Chief United States District Judge.”

(Tr. 19.)

From this latter order appellant now appeals to this Honorable Court. (Tr. 29.)

The facts of this case relating to the conviction of the appellant are set forth in the decision of this Honorable Court in

*Swope v. Mugavero*, 188 F. (2d) 601, rehearing denied May 24, 1951,

involving a codefendant of the appellant. In that case Mugavero contended, as does the appellant in our case at bar, that he was suffering double punishment for the same offense. The Court below did not consider the question of double punishment for the reason that as a result of good-time credits forfeited petitioner had not completed service of the concededly valid sentence.

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### ISSUES.

The issues raised herein by appellant, may, in substance, be stated as follows:

- I. Has the appellant suffered double punishment for the same offense?
- II. May a Court properly inquire into the forfeiture of good-time credits by prison officials?

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### ARGUMENT.

#### I.

#### THE APPELLANT HAS NOT SUFFERED DOUBLE PUNISHMENT FOR THE SAME OFFENSE.

In *Swope v. Mugavero*, supra, this Honorable Court, in reversing a decision of the District Court, found that Mugavero had not suffered double punishment

for the same offense. Inasmuch as the issue raised by appellant herein was identical with the issue raised by Mugavero, appellee adopts in toto as his argument on this phase of the appeal the decision of this Honorable Court in *Swope v. Mugavero*, supra, the authorities cited therein and the reasoning in support thereof.

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## II.

### A COURT MAY NOT PROPERLY INQUIRE INTO THE FORFEITURE OF GOOD-TIME CREDITS BY PRISON OFFICIALS.

Appellant herein and four others, including Mugavero, were convicted in the Southern District of New York on March 9, 1944 on an indictment in nine counts involving two trailer trucks numbered 3 and 4, and their contents, eight of which counts charged violations of Title 18 U.S.C.A., Section 409 (now Sections 659 and 2117), and the ninth, a violation of the Conspiracy Statute, Title 18 U.S.C.A., Section 88 (now Section 371). Each of the first eight counts charged that the defendants "unlawfully, wilfully and knowingly did steal, take and carry away from certain trailer trucks of the Rapid Motor Lines, Inc." goods belonging to various shippers or consignees and forming part of an interstate shipment of freight. Appellant was sentenced on March 16, 1944 to an aggregate term of 15 years; 10 years on Counts one and two, ordered to run concurrently; 5 years on Counts three to eight, inclusive, ordered to run concurrently, but consecutively to the sentences on Counts



one and two; and 1 year and 1 day on Count nine, ordered to run concurrently with the sentence imposed on Counts three to eight, inclusive. The appellant contends that only ten years of the aggregate term imposed is valid and that had not his good-time credits been improperly forfeited he would have been entitled to his release some months prior to the filing of his petition for writ of habeas corpus. Originally a total of 732 days were forfeited by the prison authorities at the United States Penitentiary at Atlanta, Georgia, where the appellant was first confined, and at the United States Penitentiary at Alcatraz, California, where the appellant is presently confined; thereafter, 400 days were restored to the appellant, leaving a balance of 332 days remaining forfeited. As a result of such forfeiture, the ten-year sentence does not expire until on or about September 10, 1951. Appellee argued, and the Court below held, that since the Courts do not inquire into the question of whether a prisoner's good-time credits are properly or improperly forfeited, he has not served his ten-year sentence and, accordingly, even if the remainder of the sentence was invalid, he was not then and there entitled to his release by habeas corpus. In support of this argument appellee cited the following cases:

*Sarshik v. Sanford (Warden)*, 53 Fed. Supp. 425, 142 F. (2d) 676 (C.C.A. 5) same affirmed;

*Platek v. Aderhold* (C.C.A. 5), 73 F. (2d) 173, 175;

*Kelly v. Dowd* (C.C.A. 7), 140 F. (2d) 81, 83,  
 certiorari denied 323 U.S. 786;  
*Griffin v. Zerbst*, 83 F. (2d) 806;  
*Snow v. Roche (Judge)*, (C.C.A. 9), 143 F.  
 (2d) 718, certiorari denied 323 U.S. 788;  
*Pagliaro v. Cox (Warden)*, 54 Fed. Supp. 6,  
 143 F. (2d) 900 (C.C.A. 8) same affirmed.

On these cases appellee herein likewise relies, although the question will become moot after September 10, 1951, when, even with good-time credits forfeited, the appellant will have served his ten-year sentence.

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#### CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below denying the petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,  
 August 24, 1951.

CHAUNCEY TRAMUTOLO,  
 United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

*Attorneys for Appellee.*